

**NO. 48655-5-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JONATHAN WATSON,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court erred when it entered judgment against the defendant for first degree robbery because the record contains no evidence that the credit union was “authorized by federal or state law to accept deposits” in Washington State.

2. The trial court erred when it imposed a three strikes sentence because the defendant’s prior Utah conviction for attempted robbery was neither legally nor factually equivalent to a Washington strike offense.

### ***Issues Pertaining to Assignment of Error***

1. Under RCW 9A.56.200(1)(b), does substantial evidence support a conviction for first degree robbery of a financial institution when there is no evidence in the record that the credit union the defendant robbed was “authorized by federal or state law to accept deposits” in Washington State?

2. Does a trial court err if it imposes a three strikes sentence in a case in which one of the out-of-state convictions is neither legally nor factually equivalent to a Washington strike offense?

## STATEMENT OF THE CASE

### *Factual History*

At about 5:00 pm on December 27, 2013, Amanda Jackson was working as a teller at the Lacey branch of the Navy Federal Credit Union when a thin built white man, a little over six feet tall with a pockmarked or scarred face and no facial hair approached her tellers window and handed her a note. RP 141-142, 148. The man was wearing a heavy coat, gloves, a hat with a sweatshirt “hoodie” over it and had been using a cell phone while standing in line in spite of a sign in the lobby that prohibited that conduct. *Id.* The note demanded that Ms Jackson hand over money. *Id.* When she was slow in complying the robber put his hand in his pocket and told her that he had a gun and would shoot her if she did not hurry. RP 144-146. One of the packets of money she put in his bag had a GPS homing device between the bills used just for the purpose of tracking bank robbers. RP 144-146-159.

Once the person left the bank Ms Jackson instructed the other employees to lock the doors and call the police. RP 150-151, 163-164. Within a few minutes an officer arrived and took an initial statement from Ms Jackson and the other employees. RP 165-167. At the same time police dispatch was feeding numerous other officers the changing location of the GPS tracker. RP 63-65, 67-68. Within about 15 minutes a number of Lacey police officers stopped an old yellow Dodge pickup with a camper on the

back and pulled out two persons. RP 278-285. The driver was Earl Alexander. RP 290-293. The passenger was the defendant Jonathan Watson. *Id.* Inside the truck cab the officers found a backpack with the bank's money inside, a dark coat and the GPS tracker. RP 257-267. They also found a yellow notepad with paper identical to the note the robber had left at the bank. *Id.*

Within a few minutes a Lacey police officer brought Ms Jackson to the scene of the stop. RP 74-75, 165-167. Once she arrived Ms Jackson positively identified the defendant as the person who had robbed her. *Id.* The police then arrested both Mr. Alexander as well as the defendant and took them into custody. RP 282-284. At the Thurston County Jail a corrections officer found a bindle of powder in the defendant's wallet. RP 506-509. The powder later tested positive for methamphetamine. RP 605-610. Mr. Alexander later made a deal with the prosecutor and the police and told them that he had driven the defendant to the Credit Union so the defendant could rob it. RP 565, 568, 575-576.

### ***Procedural History***

By information filed December 31, 2013, the Thurston County Prosecutor charged the defendant Jonathan Watson with one count of first degree robbery of a financial institution under RCW 9A.56.200(1)(b) as well as possession of methamphetamine. CP 3. The state also served the

defendant with a “Notice of Intent to Seek Sentence of Life Imprisonment” upon an allegation that he had two prior, independent strike convictions. CP 4. The case eventually came on for trial before a jury during which the state called fourteen witnesses, including Amanda Jackson, a number of arresting and investigating officers, other bank employees, a forensic scientist who testified that drugs in the defendant’s wallet contained methamphetamine, as well as Mr. Alexander. CP 47-616. These witnesses testified to the facts contained in the preceding factual history. *See Factual History, supra.*

On three separate occasions during the trial witnesses testified to the business Navy Federal Credit Union transacted. CP 120, 483 and 513. On the first occasion Amanda Jackson testified as follows on direct examination:

Q. On December 27, 2013 was the Navy Federal Credit Union an institution that accepted deposits as a financial institution?

A. Yes.

Q. What are some of the services, if you would just generally describe what Navy Federal Credit Union offered.

A. We were a cash branch. We offered cash deposits, cash withdrawals, credit card payments, loan payments. You could apply for all of the above accounts. We were a full service credit union during our operating hours.

Q. The Navy Federal Credit Union, is that a national credit union institution?

A. Yes.

CP 120.

In the second instance Janet Abramson, the credit union manager, stated the following concerning the nature of the credit union's business as it related to deposits:

Q. Is the Navy Federal Credit Union regulated by a federal government agency with regard to its deposits?

A. Yes, it's the National Credit Union Association, NCUA.

Q. And are the deposits that are kept at the Navy Federal Credit Union insured by that same institution?

A. Yes.

Q. And does that institution, the National Credit Union Administration also regulate the credit union industry?

A. Yes.

Q. Does the Navy Federal Credit Union accept deposits as a financial institution under the federal and state laws?

A. Yes.

RP 484.

Finally, another bank teller from the Navy Federal Credit Union stated the following concerning deposits at that financial institution.

Q. Does the Navy Federal Credit Union accept deposits as a financial institution in the state of Washington?

A. Yes, we do.

RP 513.

Following the end of the state's case the defense closed without

calling any witnesses. RP 616-621. The court then instructed the jury without objection from either party. RP 591-592. The “to convict” instruction the court gave stated the following:

#### INSTRUCTION NO. 18

To convict the defendant of the crime of robbery in the first degree, as charged in Count I, each of the following sex elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 27, 2013, the defendant or an accomplice unlawfully took personal property from the person or in the presence of another;

(2) That the defendant or an accomplice intended to commit theft or the property;

(3) That the taking was against the person’s will by the defendant’s or an accomplice’s use or threatened use of immediate force, violence or fear of injury to that person or to that person’s property or to the person or property of another.

(4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property;

(5) That the defendant or an accomplice committed the robbery within and against a financial institution; and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 126.

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The court also provided the jury with a definition for the term “financial institution” as used in part (5) of the “to convict” instruction. CP 124. This instruction stated:

INSTRUCTION NO. 16

“Financial institution” means a bank, trust company, mutual savings bank, savings and loan association, or credit union authorized by federal or state law to accept deposits in this state.

CP 124.

Following instruction the parties presented their oral argument and the jury retired for deliberation, eventually bringing back verdicts of guilty to first degree robbery and possession of methamphetamine. RP 639-680, 688-689; CP 101-102.

At the subsequent sentencing hearing in this case the state presented a number of documents in support of its claim that the defendant had two prior strike convictions. CP 132-143. These documents included a “Statement of Defendant, Certificate of Counsel and Order” that revealed that on March 31, 2000, the defendant plead guilty in the Third Judicial District Court for Salt Lake County on March 31, 2000, to the crimes of “Attempted Robbery” under U.C.A. 76-6-301 and “Theft” under U.C.A. 76-6-404. CP 186. This document listed the elements of these offenses using the following language:

The elements of the crime(s) of which I am charged are as

follows:

- 1) Attempt to take Property from a third party by force or threat
- 2) Attempt to appropriate property of another unlawfully and without permission with a purpose to deprive.

CP 187 (first sentence in print; remainder in longhand).

This same document also included the following statement by the defendant as to the conduct he committed that constituted the crimes charged:

My conduct and the conduct of other persons for which I am criminally liable that constitutes the element(s) of the crime(s) charged is as follows:

1) On September 3, 1999, at 2280 S. Highland Drive I attempted to steal beer by means of a threat of harm to the employee at the convenience store located there:

2) On September 3, 1999, at 209 So[uth] 1300 East I attempted to take an 18 pack of beer and leave the premises without paying for it.

CP 187 (first sentence in print; remainder in longhand).

The defense did not dispute the facts of these convictions. RP 6-7. Rather the defense made three arguments. CP 248-292; RP 28-48. First, the defense argued that the Utah conviction was neither legally nor factually equivalent to a Washington strike offense. *Id.* Second, the defense argued that the trial court's determination whether or not the defendant's Utah offense was factually equivalent to a Washington Strike Offense violated the defendant's right to have a jury determine all of the facts necessary to

enhance punishment. *Id.* Third, the defense argued that the imposition of a sentence of life without release for this offense violated the defendant's Eighth Amendment right to be free from cruel and unusual punishment. *Id.* The court rejected each of these arguments and found that the defendant's Utah conviction was both the legal and factual equivalent to a Washington Strike Offense. RP57-70. As a result, the court imposed a sentence of life in prison without the possibility of release. CP315-323. The defendant thereafter filed timely notice of appeal. CP 305-314.

## ARGUMENT

### **I. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT FOR FIRST DEGREE ROBBERY BECAUSE THE RECORD CONTAINS NO EVIDENCE THAT THE CREDIT UNION WAS “AUTHORIZED BY FEDERAL OR STATE LAW TO ACCEPT DEPOSITS” IN WASHINGTON STATE.**

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.*

“Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth

of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar the state charged the defendant with first degree robbery under RCW 9A.56.200(1)(b). This statute states:

(1) A person is guilty of robbery in the first degree if:

. . . .

(b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

RCW 9A.56.200(1)(b).

The term “robbery” as used in this statute is defined in RCW 9A.56.190 as the unlawfully taking of personal property from the person of another against his or her will by the use or threatened use of immediate force, violence, or fear of injury. In this case the defense does not dispute

that the defendant's conduct constituted a robbery under this definition. However, to constitute first degree robbery the state had the burden of proving the additional element that the defendant committed the robbery "within and against a financial institution as defined in RCW 7.88.010 or 35.58.060." As the following sets out, there is no substantial evidence to support this added element.

Under RCW 7.88.010(6), the legislature has defined the term "financial institution" as follows:

(6) "Financial institution" means a bank, trust company, mutual savings bank, savings and loan association, or credit union authorized by federal or state law to accept deposits in this state.

RCW 7.88.010(6).

Given this definition and given the facts of this case, in order for the defendant's crime to qualify as a first degree robbery under the RCW 9.88.010(6) alternative, the state had the burden of proving that the robbery occurred at and to a "credit union authorized by federal or state law to accept deposits in this state."

By contrast, under RCW 35.38.060 the legislature defined the term "financial institution" as follows:

"Financial institution," as used in the foregoing provisions of this chapter, means a branch of a bank engaged in banking in this state in accordance with \*RCW 30.04.300, and any state bank or trust company, national banking association, stock savings bank, mutual savings bank, or savings and loan association, which institution is

located in this state and lawfully engaged in business.

\* Reviser's note: RCW 30.04.300 was recodified as RCW 30A.04.300 pursuant to 2014 c 37 § 4, effective January 5, 2015.

RCW 35.38.060.

Under the plain language of this provision, the term "financial institution" is limited to a "bank or trust company," a "national banking association," a "stock savings bank," a "mutual savings bank," or a "savings and loan association." It does not include "credit unions" such as the Navy Federal Credit Union. Neither can one of the terms used in RCW 35.38.060 be expansively defined to include "credit unions" given the fact that the legislature in RCW 7.88.010(6) includes each type of institution listed in RCW 35.58.060 and then adds the term "credit union." Thus, the legislature's failure to include "credit union" in the RCW 35.38.060 definition of "financial institutions" precludes application of that definition in the case at bar.

The foregoing conclusion follows from the principle of statutory construction expressed in the Latin phrase *exclusio expressio unius est exclusio alterius*. In other words, where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature. *In re Pers. Restraint of McCarthy*, 161 Wn.2d 234, 241,

164 P.3d 1283 (2007).

Under this rule, the legislature's use of the term "credit union" in RCW 7.88.010(6) and failure to use the term "credit union" in RCW 35.38.060 indicates a specific intent to refrain from using the term in the latter statute. Thus, in the case at bar, appellant's first argument on lack of substantial evidence to support a conviction for first degree robbery turns on the issue whether or not the record contains evidence that the Navy Federal Credit Union was a "credit union authorized by federal or state law to accept deposits in this state" as that phrase is used in RCW 7.88.010(6). The following examines this evidence.

Appellant's review of the record on appeal reveals three occasions during which witnesses testified concerning the nature of the Navy Federal Credit Union. On the first occasion Amanda Jackson testified as follows on direct examination:

Q. On December 27, 2013 was the Navy Federal Credit Union an institution that accepted deposits as a financial institution?

A. Yes.

Q. What are some of the services, if you would just generally describe what Navy Federal Credit Union offered.

A. We were a cash branch. We offered cash deposits, cash withdrawals, credit card payments, loan payments. You could apply for all of the above accounts. We were a full service credit union during our operating hours.

Q. The Navy Federal Credit Union, is that a national credit union institution?

A. Yes.

CP 120.

In this testimony, Ms Jackson did not claim that the Navy Federal Credit Union was “authorized by federal or state law to accept deposits in this state.” Certainly she testified that the credit union accepted deposits in Washington. However, she did not claim that this action was “authorized by federal or state law.” Thus, this testimony does not constitute substantial evidence on this element that elevates the crime to first degree robbery.

In the second instance Janet Abramson, the credit union manager, stated the following concerning the nature of the credit union’s business as it related to deposits:

Q. Is the Navy Federal Credit Union regulated by a federal government agency with regard to its deposits?

A. Yes, it’s the National Credit Union Association, NCUA.

Q. And are the deposits that are kept at the Navy Federal Credit Union insured by that same institution?

A. Yes.

Q. And does that institution, the National Credit Union Administration also regulate the credit union industry?

A. Yes.

Q. Does the Navy Federal Credit Union accept deposits as a

financial institution under the federal and state laws?

A. Yes.

RP 484.

Although the last question does come close to asking whether or not federal or state law “authorizes” the Navy Federal Credit Union to take deposits in Washington state, it does not quite ask this question. Rather, what it really asks is two questions. The first is whether or not the credit union accepts deposits, which it does. The second is whether or not the credit union is regulated by state and federal laws, which it is. However, it fails to make the claim that federal or state law “authorizes” the acceptance of deposits in the state of Washington.

Finally, in this case another bank teller from the Navy Federal Credit Union stated the following concerning deposits at that financial institution.

Q. Does the Navy Federal Credit Union accept deposits as a financial institution in the state of Washington?

A. Yes, we do.

RP 513.

Once again, this testimony fails to establish that the credit union is “authorized by federal or state law to accept deposits in this state.” As a result, substantial evidence does not support the existence of the element that raises the defendant’s conduct to first degree robbery. Consequently, this court should vacate the conviction for first degree robbery.

**II. THE TRIAL COURT ERRED WHEN IT IMPOSED A THREE STRIKES SENTENCE BECAUSE THE DEFENDANT'S PRIOR UTAH CONVICTION FOR ATTEMPTED ROBBERY WAS NEITHER LEGALLY NOR FACTUALLY EQUIVALENT TO A WASHINGTON STRIKE OFFENSE.**

The inclusion of foreign convictions in a defendant's offender score or as strike offenses is controlled by RCW 9.94A.525(3), which states:

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3) (formerly codified as RCW 9.94A.360(3)).

Washington case law interpreting this statute indicates that in determining the effect of a foreign conviction, the sentencing court must first compare the elements of the foreign conviction to elements of any comparable Washington statute. *State v. Ford, supra*. If the elements are identical, then the analysis ends. *State v. Bush*, 102 Wn.2d 372, 9 P.3d 219 (2000). However, if the foreign statute defines the offense in broader terms, the sentencing court must then look to the actual conduct to determine the equivalent Washington offense. *State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998).

Evidence setting out the conduct that led to the foreign conviction can

be found in supporting documents such as the Indictment, the Statement of Defendant on Plea of Guilty (if the defendant pled guilty), the Jury Instruction (if the defendant went to a jury trial), or the Judgment and sentence. Upon determining the conduct proven, the court should then determine what crime, if any, it would constitute under Washington law. *State v. Morley, supra*. The state had the burden of producing sufficient evidence to prove by a preponderance of the evidence that the actual conduct constituted a particular offense in Washington. *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). The appellate courts conduct a de novo review of this determination by the trial court. *State v. McCraw*, 127 Wn.2d 281, 898 P.2d 838 (1995).

For example, in *State v. Cameron*, 80 Wn.App. 374, 909 P.2d 309 (1996), the defendant pled guilty to delivery of heroin. At sentencing, the defendant stipulated that he had a prior federal conviction for conspiracy to possess marijuana with intent to deliver. However, he argued that it had washed because he subsequently spent more than five consecutive years in the community crime free. The state agreed with the defendant's factual assertion, but argued that the conviction counted toward the defendant's offender score because (1) a ten year wash out period applied, and (2) the defendant had not spent ten years crime free (which fact the defendant conceded). The trial court agreed with the state's analysis, counted the prior federal conviction as three points, and sentenced the defendant to 36 months

on a range of 36 to 48 months. The defendant then appealed, arguing that the correct range was from 21 to 27 months in prison.

In its analysis, the Court of Appeals first noted that in determining the applicability of a foreign conviction under RCW 9A.360(3), the court was required to analyze the elements of the foreign offense and compare it to the comparable Washington crime. Upon doing this, the court held that the federal conviction had the same elements as conspiracy to possess marijuana with intent to deliver under RCW 69.50.401(a)(1)(ii), which is a class C felony with a maximum term of five years in prison.

The Court of Appeals then addressed the state's argument that the prior federal conviction was a second drug offense, and that under RCW 69.50.408, the maximum applicable term was doubled to ten years in prison. The Court of Appeals responded that it agreed with the state's legal analysis. However, it disagreed with the state's factual analysis, finding that the record indicated that the prior federal conviction had not been treated as a subsequent offense. Thus, the court held that the trial court should have applied the five year period, thus washing out the federal conviction. As a result, the court reversed and remanded for resentencing.

In the case at bar, the state argued that the trial court should include the defendant's Utah conviction for attempted robbery in his offender score as a strike offense because it was legally comparable to a Washington

conviction for either second degree robbery or attempted second degree robbery. As the following explains this argument was in error.

In this case the state's evidence revealed that the defendant was convicted of attempted robbery under U.C.A. 76-6-301 committed on September 3, 1999. As of that date this statute stated:

(1) A person commits robbery if:

(a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, *by means of force or fear*, or

(b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft.

(2) An act shall be is considered "in the course of committing a theft" if it occurs in an attempt to commit theft, commission of theft, or in the immediate flight after the attempt or commission.

(3) Robbery is a felony of the second degree.

U.C.A. 76-6-301 (1999) (emphasis added).

By contrast, in Washington the legislature has defined the term "robbery" as follows:

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will *by the use or threatened use of immediate force, violence, or fear of injury* to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was

prevented by the use of force or fear.

RCW 9A.56.190 (emphasis added).

Under U.C.A. 76-6-301(1)(a) as it existed in 1999, a person who took personal property from another “by means of force or fear” would be guilty of robbery. There was no requirement that the “means of force or fear” be “immediate.” By contrast, under RCW 9A.56.190, the “force, violence, or fear of injury” must be immediate for the crime to be robbery. In addition, a careful review of U.C.A. 76-6-301 indicates that the Utah Legislature’s failure to include the requirement of immediacy under part (1)(a) is no error. Under part (1)(b), which is an alternative method for committing the crime, a person who “uses force or fear of immediate force” is also guilty of robbery. Thus, under one alternative under Utah law there is no requirement of immediacy while under the second there is. Consequently, not every commission of a robbery under Utah law also constitutes the commission of a robbery under Washington law. The two statutes are not legally equivalent.

As was mentioned above, if the foreign statute is more expansive than the Washington statute as the Utah statutes is here, then the sentencing court should undertake a factual analysis and determine whether or not the facts alleged in the record at sentencing would necessarily constitute the crime at issue under Washington law. In this case the state presented only one document setting out the facts underlying the defendant’s Utah case. This

document was the “Statement of Defendant, Certificate of Counsel and Order” which is the equivalent of a Statement of Defendant on Plea of Guilty under Washington law. That document set out the elements of the offense as follows: “Attempt to take Property from a third party by force of threat.” This constitutes the elements of the offense under the (1)(a) alternative of U.C.A. 76-6-301 (1999). The defendant then admitted to the following conduct as related to that robbery charge as alleged under U.C.A. 76-6-301(1)(a):

1) On September 3, 1999, at 2280 S. Highland Drive I attempted to steal beer by means of a threat of harm to the employee at the convenience store located there;

CP 187.

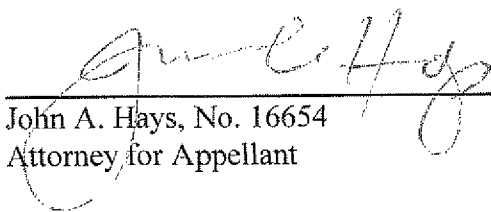
As is clear from the language of the plea form, the state did not allege that any immediacy in the use of threatened use of force and the defendant did not admit any immediacy in the use or threatened use of force. Thus, in this case, under the facts as presented by the state, the crime the defendant committed in Utah was not the factual equivalent of either robbery or attempted robbery under Washington law. Consequently, the trial court erred when it found that the defendant’s Utah conviction constituted the factual equivalent of a Washington strike offense.

## CONCLUSION

Since substantial evidence does not support the conclusion that the defendant committed a robbery against a financial institution as that phrase is used in the robbery statute, this court should vacate the defendant's conviction and remand with instructions to find the defendant guilty of second degree robbery. In addition, since the defendant's Utah offense is neither the legal nor factual equivalent of a Washington strike offense, this court should vacate the defendant's three strike's sentence and remand for sentencing under the standard range.

DATED this 22nd day of July, 2016.

Respectfully submitted,



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John A. Hays, No. 16654  
Attorney for Appellant

## **APPENDIX**

### **RCW 7.88.010**

#### **Definitions**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) “Affiliate” means any person that controls, is controlled by, or is under common control with a financial institution.

(2) “Civil action” means a civil proceeding pending in a court or other adjudicatory tribunal with jurisdiction to issue a request or subpoena for records, including a voluntary or mandated alternative dispute resolution mechanism under which a party may compel the production of records. “Civil action” does not include an examination or enforcement proceeding initiated by a governmental agency with primary regulatory jurisdiction over a financial institution in possession of a compliance review document.

(3) “Compliance review personnel” means a person or persons assigned and directed by the board of directors or management of a financial institution or affiliate to conduct a compliance review, and any person engaged or assigned by compliance review personnel or by the board of directors or management to assist in a compliance review.

(4) “Compliance review” means a self-critical analysis conducted by compliance review personnel to test, review, or evaluate past conduct, transactions, policies, or procedures for the purpose of confidentially (a) ascertaining, monitoring, or remediating violations of applicable state and federal statutes, rules, regulations, or mandatory policies, statements, or guidelines, (b) assessing and improving loan quality, loan underwriting standards, or lending practices, or (c) assessing and improving financial reporting to federal or state regulatory agencies.

(5) “Compliance review document” means any record prepared or created by compliance review personnel in connection with a compliance review. “Compliance review document” includes any documents created or data generated in the course of conducting a compliance review, but does not include other underlying documents, data, or factual materials that are the subject of, or source materials for, the compliance review,

including any documents in existence prior to the commencement of the compliance review that are not themselves compliance review documents related to a past compliance review.

(6) "Financial institution" means a bank, trust company, mutual savings bank, savings and loan association, or credit union authorized by federal or state law to accept deposits in this state.

(7) "Person" means an individual, group, committee, partnership, firm, association, corporation, limited liability company, or other entity, including a financial institution or affiliate and its agents, employees, legal counsel, auditors, and consultants.

#### **RCW 9A.56.200**

(1) A person is guilty of robbery in the first degree if:

(a) In the commission of a robbery or of immediate flight therefrom, he or she:

(i) Is armed with a deadly weapon; or

(ii) Displays what appears to be a firearm or other deadly weapon;

or

(iii) Inflicts bodily injury; or

(b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

(2) Robbery in the first degree is a class A felony.

**RCW 35.38.060**

**Definition — “Financial institution”**

“Financial institution,” as used in the foregoing provisions of this chapter, means a branch of a bank engaged in banking in this state in accordance with \*RCW 30.04.300, and any state bank or trust company, national banking association, stock savings bank, mutual savings bank, or savings and loan association, which institution is located in this state and lawfully engaged in business.

\* Reviser’s note: RCW 30.04.300 was recodified as RCW 30A.04.300 pursuant to 2014 c 37 § 4, effective January 5, 2015.

**U.C.A. 76-6-301 (1999)**

(1) A person commits robbery if:

(a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, or

(b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft.

(2) An act shall be is considered “in the course of committing a theft” if it occurs in an attempt to commit theft, commission of theft, or in the immediate flight after the attempt or commission.

(3) Robbery is a felony of the second degree.

**COURT OF APPEALS OF WASHINGTON, DIVISION II**

**STATE OF WASHINGTON,  
Respondent,**

**vs.**

**JONATHAN WATSON,  
Appellant.**

**NO. 48655-6-II**

**AFFIRMATION  
OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Ms Carol Laverne  
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Washington State Penitentiary  
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Walla Walla, WA 99362

Dated this 22<sup>nd</sup> day of July, 2016, at Longview, WA.



Donna Baker

## HAYS LAW OFFICE

**July 22, 2016 - 9:54 AM**

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